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Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL,

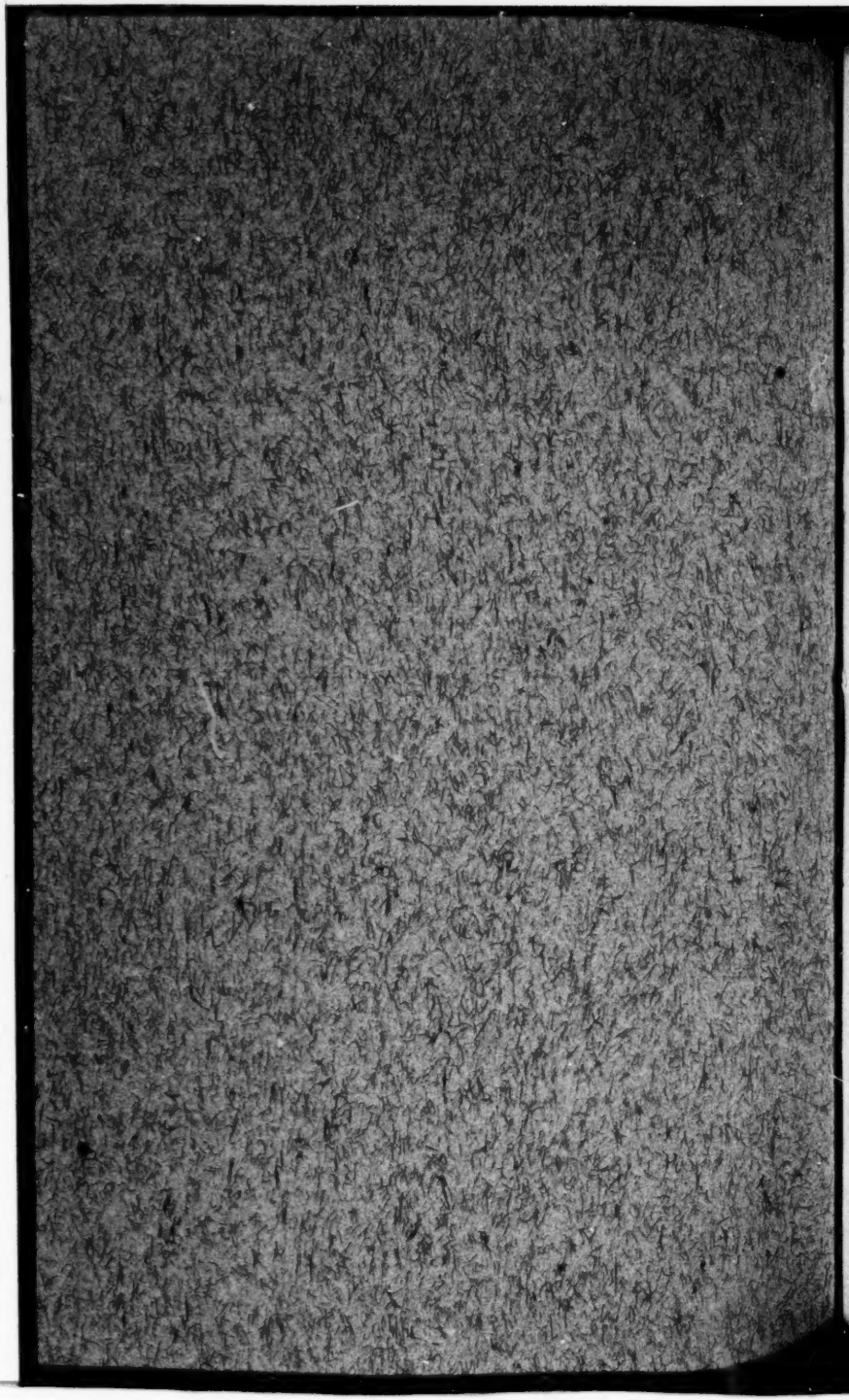
Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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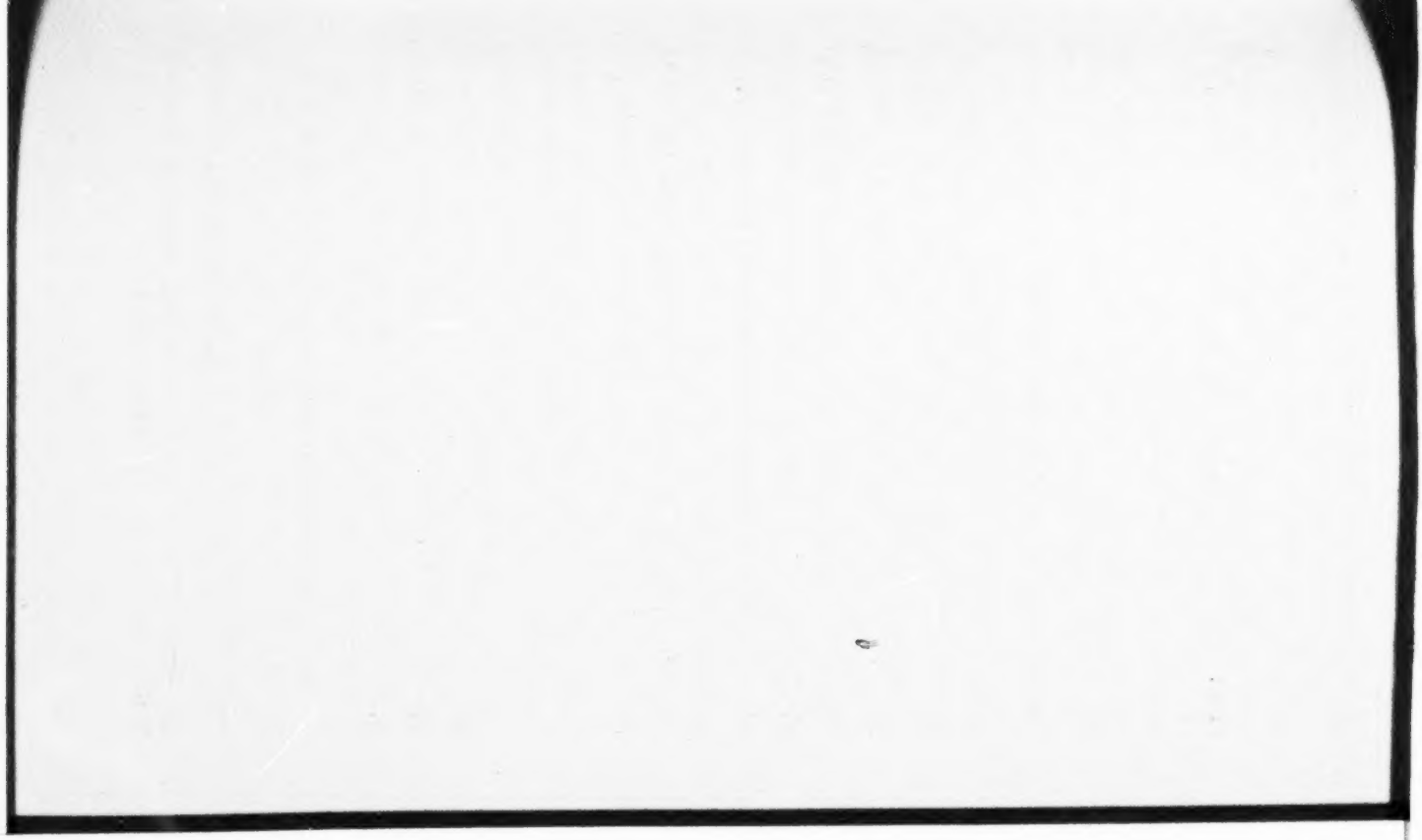
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Supreme Court of the United States

OCTOBER TERM, 1949

No.

GEORGE MARSHALL,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

This is an application for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the District Court of the United States for the District of Columbia convicting petitioner of a violation of Title 2, § 192 of the United States Code.

The Opinion Below

The opinion of the Court of Appeals was written by Judge Sweeney. It has not yet been officially reported.

Summary Statement

This appeal presents some important constitutional problems arising out of the issuance of subpoenas by the Un-American Activities Committee of the House of Repre-

sentatives (which we shall hereafter call the Committee) different from any heretofore presented to this Court.

Petitioner was subpoenaed as Chairman of the National Federation of Constitutional Liberties (which we shall hereafter call the Federation) to produce records of that organization relating to the solicitation and disbursement of funds with a list of all contributors (Govt.'s Ex. 1, R. 144).

The indictment, so far as relevant on this appeal, charged petitioner with wilfully having refused to produce these records (R. 2, 3).

The activities of the Federation are described in a statement (Deft.'s Ex. 14, R. 200-209) which petitioner submitted to the Committee when he first appeared in New York:

> "The activities of the NFCL have always been public in character. They consist principally of the preparation and distribution of publications in the field of civil rights, protection of the rights of labor, analysis of legislation, development and support of legislative programs, public campaigns including campaigns against discrimination and native fascists, campaigns to extend the franchise, and campaigns to aid the victims of oppression. These campaigns are frequently implemented by Action Letters, testimony before legislative committees, briefs filed in court, public statements, by organizing meetings and delegations to petition the government, and by participating in public conferences" (R. 201).

The same statement set forth the objections of petitioner and the Federation to the production of the records called for by the subpoena:

> "The House Un-American Committee, in its demands upon the Federation, exceeds whatever power Congress may have given it, serves no legislative purpose, and violates the Federation's rights guaranteed by the First Amendment to the United States Constitution. By its sweeping requests for production of books and records, lists of contributors, etc., it indulges in a mis-

use of the Congressional subpoena power, and thus violates the protection guaranteed to the Federation by the Fourth Amendment to the Constitution. The Un-American Committee seeks to have the Federation yield to its demands to be permitted to engage in a fishing expedition into the Federation's files and records. The end result will not be the discovery of any un-American or subversive propaganda, but rather that the names of good Americans will be added to the notorious Dies Committee 'blacklist', that the Federation will be smeared, that its work will be hampered and interrupted, that its supporters will be browbeaten and harassed, and that the reactionary and fascist-minded press will be specially favored as it has been in the past with material for a Roman holiday of red-baiting against progressives and progressive action" (R. 204, 205).

But petitioner did not rely only on this challenge of the power of the Committee. He presented to it (R. 80, 82) a comprehensive cross section of the propaganda material distributed by the Federation, consisting of 43 separate items. These were listed in the statement (R. 206-209) under the following headings:

1. The right to vote.
2. Equal rights to work and to use of public facilities.
3. Defense of Negroes against mistreatment.
4. Defense of rights of labor.
5. Democracy in education.
6. Democracy in the Armed Forces.
7. The danger of native fascism in America.

All this material was received by the Committee (R. 80, 81) and was put in evidence at the trial as Exhibit 13 (R. 80-82).

The contents of this material was described and analyzed at petitioner's request by Carl Swisher, Professor of Political Science at Johns Hopkins University (R. 99). His report was accepted by the Court below as an aid to it (R. 100). His conclusions are explicit to the effect that the

Federation propaganda material did not bring it within the scope of the Resolution under which the Committee was functioning.

It is in the light of the foregoing, which we shall later fully elaborate, that this Court must evaluate the rulings of the Court below on the crucial issue of pertinency and the other issues raised on this appeal.

Before trial petitioner, with certain others (see R. 14), moved to dismiss the indictment on the ground that the Resolution setting up the Committee was unconstitutional. This motion was denied in an opinion by Judge Holtzoff (R. 13-24).

On the examination of the talesmen a problem arose because a number of them were government employees. Counsel for petitioner suggested a question which called to their attention the current loyalty investigation of government employees and the connection of the Un-American Activities Committee both with that investigation and with the instant prosecution. On the basis of this relation counsel sought an inquiry whether a prospective juror might feel that his job would be affected were he to acquit (Q. G-18, R. 39). After some discussion the Court refused to allow the question to be put (R. 41). It also denied a motion to exclude all government workers from the panel (R. 39, 40). Two of the persons chosen to sit were such workers (R. 42), petitioner having exhausted all of his peremptory challenges (R. 42).

So far as is relevant on this application, the only testimony for the prosecution was that of Mr. Adamson, counsel for the Committee (R. 43), but a large quantity of exhibits was introduced on his cross-examination. Mr. Adamson testified that petitioner had first appeared before a Subcommittee in New York City (R. 43) and that on that occasion he produced publications issued by the Federation but no records (R. 45). He was then asked to appear in Washington at which time, according to Mr. Adamson, he said "that he would not produce the other records, that is,

the books, papers, books of account, record of monies received and expended" (R. 45).

Almost all of the remaining examination of this witness related to the pertinency of the material called for by the subpoena. This testimony was elicited in the absence of the jury (R. 47).

The Government expressly stated that it was relying to establish pertinency solely on an address given by Congressman Martin Dies before the Congress in September, 1942 (R. 102). Excerpts from this speech were read into the record (R. 49-65) and parts not so read into the record are printed as an exhibit (Gov. Ex. 6, R. 145-171). This speech was made by Mr. Dies in part in response to an attack upon himself by the Federation in a pamphlet which was marked Defendant's Exhibit 1.*

This pamphlet entitled "Investigate Martin Dies" consists of 48 pages. Petitioner signed the foreword which summarizes the material presented (Ex. 1, pp. 3, 4) as well as a letter of transmittal and a telegram addressed to Mr. William Power Maloney, then a special assistant to the Attorney General (Ex. 1, pp. 5-10). This letter requests a grand jury investigation of Mr. Dies on the ground that he had shielded many of the persons then (1942) recently indicted as seditionists. The first part, entitled "The Case against Martin Dies" (id. pp. 11-28) is documented by an analysis of the hearings and reports of the Dies Committee in so far as they dealt with many of these individuals, such as Winrod, Viereck, Pelley and others. The second part is a memorandum (id. pp. 29-48) showing how the Dies Committee had hindered the war effort of the United States.

It was in purported answer to this attack on him by the Federation that Mr. Dies rose to a point of "personal privilege" (R. 49) and made the speech in question. Actu-

* This exhibit was not printed in the Joint Appendix used in the Court of Appeals. It was submitted to that Court in the form in which it was originally printed—as were other exhibits listed in Appendix A of this petition. A set of these has been forwarded to this Court.

ally Mr. Dies did not answer the attack at all but launched into a counterattack on the Federation and other organizations, including also animadversions on the Attorney General (R. 146-148, 164, 169) the F. B. I. (R. 50), and Secretary Ickes (R. 168).

It will be noted that this speech was made three and a half years before the subpoena was issued and that the references to the Federation are based in part on an alleged confidential report made by the Attorney General, the date of which was never exactly determined although there is a suggestion that it was issued around September or October, 1941 (R. 77).

In considering the relevancy of the subpoena the Court should bear in mind that the Committee had, prior to its issuance, taken a position concerning the Federation in House Report No. 2233 (Ex. 17). This report, although dated after the issuance of the subpoena, was actually prepared some months earlier—in December, 1945 (R. 83). It referred to the Federation in a number of places (Ex. 17, pp. 15, 17, 32, 34, 36, 50, 61). One of the reasons for referring to it was its distributing a document first published by the Army and known as Fact Sheet No. 64; another was its circulation of a pamphlet giving advice to persons called before Congressional Committees. The Committee referred to the Federation as follows, under a heading:

> "Subversive Propaganda for Our Armed Forces"
> (Ex. 17, p. 14)
>
> "Although the Army appears to have ceased the publication and distribution of Fact Sheet No. 64, it seems that certain of our very numerous thought-control societies assumed the job of publishing this document and carrying on its distribution. One of these organizations is the National Federation for Constitutional Liberties, with offices in New York. Fact Sheet No. 64 is the basis for a pamphlet printed in colors and with full credit shown for the War Department. This is the same organization that published a pamphlet entitled 'Investigating Committees and Civil Rights,' which contains suggestions to per-

sons who are called to testify. Section 4 of this pamphlet is entitled 'Contempt of Congressional Investigating Committees'" (Ex. 17, p. 15).

Facts Sheet No. 64 is the basis of item No. 36 of Exhibit 13 in evidence (R. 84, 209). It was originally prepared by the Army and discusses native fascists, how to spot and stop them, and was introduced into the Congressional Record on April 30, 1945 by Rep. Sabath (Ex. 13, No. 36, unnumbered page 3).

The Committee's comments on this pamphlet are remarkable for their inaccuracy. Thus it says (Ex. 17, p. 14) that in this document "of Red poison" is the suggestion "that any native-born person who claims to be 100% American is either a Fascist or is likely to become one very shortly". And it says, further, "the last two pages are filled with material designed to transmit propaganda favorable to Communism and military dictatorship".

Actually, the last pages stress only the need for cooperation to preserve world peace and security "by making our democracy work". And the only mention of "100 percent American" is the statement that "The United States also has its native fascists who say that they are '100 percent American'". As to the paragraph about the Soviet Union quoted in the report (Ex. 17, p. 15), not a word of it appears in the reprint circulated by the Federation!

The other document referred to in the matter we have quoted from the report is Exhibit 18 (R. 85, 216-224). This is a serious and moderately formulated discussion of the legal problems confronting persons subpoenaed by legislative committees. That the Committee should have found it pertinent to comment on the distribution by the Federation of these documents and used the term "thought control" when so doing is a significant reflection on the Committee's attitude and mental processes.

The Committee, moreover, referred to several persons in this report because they had participated in some activity of the Federation. It listed (Ex. 17, p. 34) Rev. Fritchman for having signed a message opposing the Com-

mittee. This document (see R. 85, 116, 117) is Exhibit 19. Another instance is the listing (Ex. 17, pp. 35, 36) of one Kahn for his attendance at a meeting held by the Federation to protest anti-semitic activities (see Ex. 20, R. 224). The report quotes with evident disfavor Kahn's advocacy of equal justice for Jews and Negroes (Ex. 17, p. 35)!

At the trial petitioner contended that he had the right to establish that, in fact, the Federation was not engaged in any activities which brought it within the scope of the Committee's investigation, and in any event that he was entitled to submit to the Court all the material which the Committee had available to it when it issued the subpoena. To that end petitioner caused subpoenas to be issued both to the Clerk of the House (R. 26-31) and to the Attorney General (R. 31-36).

No formal response was made to the subpoena directed to the Clerk of the House, but the Court ruled irrelevant the crucial items demanded (R. 126). These were Nos. 7, 8, 27, 28, which called for material relating to petitioner's organization (cf. R. 126 and 27, 29).

In response to the subpoena directed to the Attorney General one Herbert Stearns employed in the Department of Justice appeared at the trial (R. 101). He testified that he had the first item which was the Attorney General's report, and also items 7, 8, 9, 11, 14, 15, 17, 18 and 19, but that he would not produce these documents because of instructions of the Department of Justice (R. 102). He said that all of the documents which he had were part of the confidential files of that Department. Objection was made to the receipt of the documents by counsel for the Government on the ground that they were irrelevant (R. 102) and the Court sustained the objection on that ground alone (R. 104).

On the cross-examination of Mr. Adamson on the issue of pertinency it appeared, however, that as counsel for the Committee on Un-American Activities, Mr. Adamson

had examined the pamphlet literature mentioned in the Attorney General's report, some of which had been produced by petitioner at the first hearing (R. 71).

Specifically the Committee had before it and had considered (R. 71) the following documents which were also referred to by the Attorney General in his report (the page references to the record following the exhibit numbers will indicate where Mr. Adamson testified to the above effect):

The call to a Conference on Constitutional Liberties issued in June, 1940, listing the proposed speakers at that conference (Ex. 2, R. 72).

Brochure describing the Federation, undated (Ex. 3, R. 73).

Pamphlet reprinted at pp. 172-175 on conscription and civil liberties (Ex. 4, R. 76).

Other documents and material issued by the Federation (in addition to the 43 documents submitted by petitioner in New York) were in the possession of the Committee. Some of these were received in evidence as illustrative of the Federation's work (R. 80), but the Court blocked counsel's effort to have it all introduced (R. 79 and see Point V). The material which is in evidence (Exs. 5-12, R. 175-191) included the following:

Action Letter opposing peacetime conscription (Ex. 5, R. 175-176).

Pamphlet "Witch Hunt 1941" (Ex. 6, R. 176-182).

Declaration, Bill of Rights Day (Ex. 8, R. 182, 183).

Pamphlet "Keeping Elections Free" (Ex. 9, R. 183-188).

Action Letter, supporting Anti-Poll Tax Bill (Ex. 11, R. 188-190).

Action Letter, urging cooperation with FEPC (Ex. 12, R. 190, 191).

All this material had previously been known to the Committee prior to the issuance of the subpoena (R. 92).

There was also introduced in evidence a statement made by petitioner at the time he appeared before the full Committee (R. 83, Ex. 16, reprinted at R. 214-216), a report

of the Committee on Un-American Activities (Ex. 17), extracts from a pamphlet entitled "Investigating Committees and Civil Rights" (Ex. 18, reprinted at pp. 216-223), which was referred to in that report of the Committee (R. 85), as also was (R. 85, 86) a publication called "A Message to the House of Representatives", being a petition signed by many representative Americans asking the abolition of the Committee (Ex. 19).

It is petitioner's contention, which has never been controverted, that all of the material produced clearly indicates that the activities of the Federation were of such a character as to exclude them completely from any legitimate concern of the Committee, that its activities were of a character entirely protected by the First Amendment, that no conceivable definition of the terms of the Resolution could cover them, even assuming, as we do not, that the Committee could constitutionally inquire into anything under the vague and uncertain terms there used.

Counsel for petitioner also sought to establish at the trial that the Committee on Un-American Activities was acting as a censor of propaganda with which it did not agree and was engaged in compiling a blacklist of organizations and individuals, including the Federation itself (R. 94, 95). Two offers of proof were made on this subject which were marked Exhibits 25 and 26 for Identification (R. 96) and are reprinted at pages 235-238—the reference on page 235 to Exhibit 35 is a typographical error. The Court ruled that these offers of proof were not relevant (R. 97).

Counsel then sought to show that the House Committee was guided by no definite or ascertainable standards, counsel precising certain evidence which he expected to bring forward in support of this contention (R. 105-117, 120). The Court before ruling on this last offer of proof prematurely ruled that it was relevant for the Committee to issue the subpoena (R. 120). Counsel also offered to prove by a witness that insofar as the Federation issued non-printed propaganda material, it was the same char-

acter as the printed material in evidence. The Court ruled that that would not be permissible (R. 121).

After a few other exhibits were offered which were rejected by the Court (R. 123-127), defense counsel offered to read to the jury the statements made by petitioner at the time he appeared in New York and Washington (Exs. 14, 16) in order to show that his refusal to produce the subpoenaed records was not wilful (R. 127). The Court refused to permit this to be done (R. 128).

In the motion to dismiss the indictment one of the grounds urged was that the subpoena directed to petitioner was void because of its unreasonable scope (R. 3). In denying that motion Judge Holtzoff ruled that the question was one of mixed law and fact and should not be determined except at the trial (R. 23). At the trial the Court overruled the objection to the subpoena (R. 120). This ground of attack on the indictment was expressly preserved by the renewal of the original motion at the end of the case (R. 128).

In addition counsel moved for an acquittal on the grounds that the Resolution was invalid, that the Government had not shown that the documents demanded by the subpoena were pertinent, and that there was insufficient evidence to go to the jury (R. 128). These motions were denied.

Certain exceptions were taken to the charge by the Court on the subject of wilfulness (R. 141) which will be referred to hereafter.

The Court of Appeals affirmed the conviction on the ground that the Committee was justified in investigating the Federation without in any way discussing the crucial issue whether the material called for was pertinent to the inquiry. It rested its decision on the ground that there might be "silent diffusion of subversive doctrine" without indicating how this contradiction in terms is possible or what basis there was for supposing that the Federation was engaged in any such activity. The record will be searched in vain for any suggestion that the Federation

was engaged in secret activities of any kind. Indeed, the entire discussion of this so-called secret activity came into the case for the first time in the opinion of the Court of Appeals. The case was not tried on any such theory.

Statement on Jurisdiction

The judgment of the Court of Appeals was entered on June 20, 1949. Jurisdiction is invoked under Judicial Code § 1254(a).

Statutes Involved

1. 2 U. S. C., § 192; R. S. § 103; June 22, 1938, c. 594, 52 Stat. 942.

Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. 2 U. S. C., § 194; R. S. § 104; July 13, 1936, c. 884, 49 Stat. 2041; June 22, 1938, c. 594, 52 Stat. 942.

Witnesses failing to testify or produce records. Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent

to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

3. Legislative Reorganization Act of 1946, 79-2, Public No. 601, ch. 753, section 121, establishing the House Committee as a standing committee of the House of Representatives and defining the powers and duties of that committee.

"Rule X

Standing Committees

(a) There shall be elected by the House at the commencement of each Congress, the following standing committees:

. . . 17. Committee on Un-American Activities, to consist of nine Members.

Rule XI

Powers and Duties of Committees

. . . (q)(1) Committee on Un-American Activities

(A) Un-American Activities.

(2) The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from

time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The language in the amendment of Rule XI by the Legislative Reorganization Act of 1946 is substantially the same as the House Resolution which initiated and continued the House Committee in effect until the establishment of the present Committee (House Resolution 5, 79-1, 91 C. R. 10, 15 (1945); H. R. 282, 75-31, 83 C. R. 7568, 7586 (1938); H. R. 26, 76-1, 84 C. R. 1098, 1128 (1939); H. R. 321, 76-3, 86 C. R. 572, 605 (1940); H. R. 90, 77-1, 87 C. R. 886, 899 (1941); H. R. 420, 77-2, 88 C. R. 2282, 2297 (1942); H. R. 65, 78-1, 89 C. R. 795, 810 (1943)).

The Questions Presented

The following questions are presented:

1. Does the resolution authorizing the investigation by the Committee on Un-American Activities of the House of Representatives—on its face and as here applied—violate petitioner's constitutional rights of freedom of speech, press and assembly and, because of the vagueness of its terms, deny him due process?

2. Were the matters called for by the subpoena pertinent to any valid inquiry which the Committee was authorized to make?

3. Was the subpoena void as in violation of the Fourth Amendment because too broad?

4. Was it proper in this case to permit government employees to remain on the jury, particularly in view of the refusal of the Trial Court to permit a full inquiry as to their possible bias?

5. Should petitioner have been permitted to offer in evidence the material which he requested from the Clerk of the House of Representatives and the Attorney General?

6. Should petitioner's offer of proof with regard to the activities of the Committee have been accepted?

7. Was it error to refuse to charge, as requested by petitioner, that there could be no wilfulness in this case without wrongful intent?

Reasons for Granting the Writ

The writ should be granted because federal issues are involved which have not heretofore been and should be determined by this Court since they are of great public importance and the decision below contravenes principles established by decisions of this Court.

1. Whether the Resolution creating the Committee on Un-American Activities is unconstitutional because it abridges freedom of speech, of the press and of assembly and because of the vagueness of its terms has never been determined by this Court. Judge Clark of the Second Circuit dissenting in *United States* v. *Josephson*, 165 Fed. (2d) at p. 93 and Judge Edgerton of the District of Columbia District Court dissenting in *Barsky* v. *United States*, 167 Fed. (2d) at p. 252, have both expressed the opinion that this Resolution is unconstitutional on these grounds. In the case at bar these observations are even more pertinent because the effect of the subpoena in this case and the purpose of its issuance were to cripple the functioning of an organization devoted to the distribution of literature protected by the guarantees of the First Amendment by adversely publicizing the supporters of the organization. As thus applied the Resolution violates petitioner's constitutional rights.

The statement by the Court of Appeals that the rights guaranteed by the First Amendment are "subordinate to the greater rights of the general public interest" flouts repeated rulings of this Court. Cf. *Terminiello* v. *Chicago*, 337 U. S. ——.

2. It is settled by decisions of this Court that material may not be demanded by the subpoena of an investigating committee unless it is pertinent to the inquiry being conducted by that committee (*Sinclair* v. *United States*, 279 U. S. 263; Cf. *McGrain* v. *Daugherty*, 273 U. S. 135). Indeed, it has been stated that a subpoena which calls

for material which is not pertinent violates the Fourth Amendment (*Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209; Cf. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298). The Court below, while paying lip service to the doctrines above stated, did not actually determine whether or not the material called for by the subpoena was relevant to the inquiry. Petitioner maintains that all of the material called for by the subpoena was protected by the First Amendment and did not come within the scope of the Resolution authorizing the inquiry. Petitioner maintains, moreover, that the issue of pertinency must be determined on the actual facts, not merely on the facts as they appeared to the Committee or on its reasonable belief concerning these facts. That question has never been passed on by this Court.

3. It is well settled by decisions of this Court that a subpoena which is too broad is void under the Fourth Amendment (*Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298). The subpoena here in question was unlimited either as to time or scope and was consequently unreasonable within the doctrine of these cases. The Court below gave no consideration to this question although it was properly presented to it.

4. While this Court has ruled that it is proper for government employees to sit as jurors in criminal cases being tried in the District of Columbia (*United States* v. *Wood,* 299 U. S. 123; *Frazier* v. *United States,* 335 U. S. 497), that issue has not been passed on in a case like the present. It will, however, be considered by the Court in *Dennis* v. *United States,* certiorari granted June 27, 1949. Because of the intimate relation between the Committee and the prosecution on the one hand and the Committee and the current loyalty investigations of government employees on the other, there is a strong probability that government employees could not actually be free from

bias. At the very least full inquiry should have been permitted to ascertain whether fear of loss of their job because of this relation might have affected such employees' ability to serve as jurors. The Trial Court refused to permit the submission of such a question to the jurors. This issue was also not considered by the Court of Appeals although properly presented to it.

5. Even on the theory adopted by the Trial Court that petitioner was limited in his proof to matters actually considered by the Committee, petitioner was prevented from showing the Court what that material actually consisted of and in that way was prevented from showing that the material called for by the subpoena was not relevant to the Committee's inquiry.

6. The Trial Court prevented petitioner from showing that the Committee was motivated to destroy the Federation because of its disagreement with views expressed by that organization and also from showing that its purpose in issuing the subpoena was to blacklist its supporters and thus destroy its effectiveness. By so doing the Trial Court not only prevented petitioner from showing that the material was not pertinent, but also prevented him from developing an effectual support for his constitutional arguments.

7. Whether or not the word "wilful" in this statute connotes more than deliberate action has not been definitely determined by this Court. Whatever may be the interpretation to be given to this word generally, different considerations obtain here because of the vagueness of the terms used in the Resolution creating the Committee. In order to save that Resolution from condemnation on the score of vagueness, the word "wilful" should have been interpreted as requested by petitioner in his request to charge, as was done by this Court in *Screws* v. *United States,* 325 U. S. 91.

POINT I

With respect to the constitutionality of the Resolution creating the Committee.

A. The Resolution on Its Face

This case in part presents the same issue which the Court had before it in *Eisler* v. *United States,* 337 U. S. ——, but did not decide because of Eisler's escape from the jurisdiction. It is an issue which is also awaiting decision in the *Barsky* case where certiorari was originally denied, 334 U. S. 843, and in which an application for rehearing has been pending undetermined for nearly a year. It is a question which will be presented to this Court in other cases now on application for certiorari. It is important and far-reaching.

On the general issue of unconstitutionality, under the First Amendment and the Fifth Amendment, of the Resolution on its face we can add little to the views expressed by Judge Edgerton in his dissent in *Barsky* v. *United States,* 167 F. 2d at 252, and by Judge Clark dissenting in *United States* v. *Josephson,* 165 F. 2d at 93. The views there expressed are, moreover, buttressed by the decision of this Court in *Winters* v. *New York,* 333 U. S. 507. There this Court stressed the necessity of a clear definition of terms where freedom of expression might be restricted because of the impact of uncertain terms. Surely the impact of the terms used in the Resolution here under consideration are bound to have an effect even more restrictive of freedom of expression than the words of the New York statute condemned by this Court in the *Winters* case.

B. The Resolution as Applied

If there be reluctance on the part of some members of this Court to deal with the question of the constitutionality of the resolution on its face, it is respectfully submitted that in the case at bar the application of the resolution

to petitioner and his organization presents an entirely different problem. Here we are concerned with an organization devoted to the advancement of civil liberties, having no other program or objective. The Committee was thoroughly familiar with its literature. It was not trying to ascertain the character of the propaganda issued by the organization by the subpoena which is here before the Court, but only to find out who its supporters were with the evident intent and purpose of giving them unfavorable publicity.

Thus, in the case at bar, the inquiry itself necessarily acted as an abridgment of freedom of speech, of the press and of assembly in violation of the First Amendment. This applies clearly from the evidence actually before the Court. It would have been conclusively established had petitioner been permitted to prove what his counsel offered to establish (see Point VI, supra).

Here we have no refusal to testify at all, as in the *Josephson* case, no facts such as the Court of Appeals found justified the subpoena in the *Barsky* case. Nor are we concerned either with the problem to which the majority of the Court of Appeals gave most of its attention in the *Barsky* case, namely, whether a witness could be asked if he was a communist.*

Whatever, therefore, might be the constitutionality of the Resolution appointing the Committee in the abstract, the question of its constitutionality as applied in this case is altogether different. Since it is evident that the purpose and effect of the inquiry is to invade rights guaranteed by the First Amendment the inquiry itself is unconstitutional.

As Judge Edgerton pointed out the situation is similar to that which was involved in the license fee cases which affected the Witnesses of Jehovah. The parallel he suggested is even stronger in the case at bar than it was in the *Barsky* case. This Court in *Murdock* v. *Pennsylvania*,

* Of course petitioner believes those cases to have been wrongly decided.

319 U. S. 105, held that municipal ordinances were unconstitutional as applied. There the ordinances were valid on their face since they were not discriminatory, nor were they applied in a discriminatory manner. Moreover, the fee charged was a moderate one. Nevertheless they were struck down when applied to the distribution of religious pamphlets sold on the public streets. This result was reached because of the impact of the fee on the circulation of religious (or for that matter political) ideas. If such an application of a valid ordinance runs foul of the First Amendment surely the application of the Resolution to the facts of this case also does.

Here we start with a legislative fiat denouncing the Federation (Ex. 17)—itself probably an unconstitutional bill of attainder (*United States* v. *Lovett*, 328 U. S. 303). This is then followed by an attempt to discover its supporters with the obvious purpose of smearing them publicly. There would be no doubt that a law which required specified organizations labelled in the law as subversive to publish a list of their supporters would be void under the *Lovett* case. When, as here, the organization is solely concerned with the protection of civil rights and its activities are fully protected by the First Amendment any similar attempt to burden its activities would be a violation of that Amendment under the *Murdock* case.

The same principles must be applicable to the investigating activities as to the legislative activities of the Congress. Otherwise form would be exalted above substance and the vital protection of the Constitution could be evaded. It is true that the Courts may be reluctant to interfere with Congressional investigations merely because impairment of freedom might conceivably result. But when such consequence is obvious and the inquiry can have no other purpose or effect than to abridge a freedom guaranteed by the Constitution the duty of a Court is plain. It must support the Constitution and block the inquiry.

The question presented certainly calls for review by this Court.

POINT II

With respect to the pertinency of the material called for by the subpoena.

The rule is quite clear that in criminal prosecutions for refusal to obey a subpoena the Trial Court must determine whether or not the question asked or the material called for was pertinent to the inquiry. The rule is fully stated in *Sinclair* v. *United States,* 279 U. S. 263. This Court said that, because of the presumption of innocence,

> "It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation" (pp. 296-297).

And:

> "The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry' " (p. 299).
>
> Cf. *McGrain* v. *Daugherty,* 273 U. S. 135, 176.

There was, therefore, a duty on the part of the Trial Court in the case at bar, evidently recognized by it, to determine this issue. It is petitioner's contention that the issue was not properly determined, or even properly understood.

Moreover a subpoena calling for the production of private papers violates the guarantee against unreasonable searches and seizures contained in the Fourth Amendment unless the material called for is relevant to some lawful inquiry. In *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, Mr. Justice Rutledge pointed out that the Amendment's requirement with regard to probable cause was satisfied by a judicial ruling that "the documents sought are relevant to the inquiry" (id. 209). Subpoenas will be held void in the absence of such relevance. See *Shotkin* v. *Nelson,* 146 F. 2d 402; *McGarry* v. *SEC,* 147 F. 2d 389.

A case particularly in point here is *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298. In that case a subpoena calling for books and records for the period of a single year was held a violation of the Fourth Amendment because it was in effect a fishing expedition into private papers. Mr. Justice Holmes said at pages 305, 306:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire."

Justice Holmes particularly called attention to the fact that the subpoena called for matters which related wholly to intrastate business. While he recognized that some part of these papers might be so connected with interstate matters as to be relevant, he said: "that possibility does not warrant demand for the whole" (p. 307). He held further that even if the proceeding had rested on substantial evidence under oath "the rudimentary principles of justice that we have laid down would apply" (p. 307).

So in the case at bar, even if there was a conceivable basis for the production of some of the records of the Federation as coming within the scope of the Resolution, in the absence of proof that all of the material called for was relevant the subpoena would be in violation of the Fourth Amendment. We, of course, contend that none of the material called for was pertinent and will now address ourselves to that problem.

1. Petitioner has consistently maintained that, in a case such as this, the issue of pertinency could not be determined without a consideration of all the facts which related to the propaganda distributed by his organization. For it must be borne in mind that he has not been charged with refusal to answer questions about the character of that organization or the activities it conducts, nor with

refusal to produce the material it had distributed. He is charged with having failed to produce the organization's financial records which were requested so as to disclose the names of contributors (see subpoena, R. 144). He stated among the reasons for his refusal to produce these records his fear that the persons whose names might be disclosed by such production would be placed on a "blacklist" by the Committee (R. 205). We submit that no inquiry into private matters such as these should be permitted except upon a clear showing of pertinency.

How can such a showing be made? The Government at the trial appears to have taken the position partly that the "reasonable belief" of the Committee was enough (R. 66) and partly that the Court could consider only what the Government said the Committee had relied on, namely, the speech of Congressman Dies (R. 102, 103). Mr. Murray said:

> "The information contained in that speech, and the contents of it, has been shown to have been in the possession of the committee, and considered by it before the issuance of the subpoena in this case.
>
> We are relying entirely upon that and therefore any evidence except that which goes to show that the Committee did not have that information before it, I submit is not relevant" (R. 103).

The Trial Court accepted this view in part and allowed in evidence some, but not all, the material which had been before the Committee (see infra 2 and Point V). But it rejected proffered material on the ground that it had not been shown that it was before the Committee, and said:

> ". . . the Committee had to function on what it had before it, and determine whether it was relevant and proper to subpoena the books and records of that party" (R. 105).

We submit that this misstates the issue. Of course the Committee could function only on what was before it, but the Committee is not here on trial. Petitioner is on

trial on a charge of having *wilfully* refused to produce certain records. He could not determine whether the records he was asked to produce were relevant on the basis of the information before the Committee since he was never informed of what that basis was. Certainly he was in no position to know what "reasonable belief" the Committee may have had. In any event he must be entitled to consider the question of relevancy on the basis of what he, as a reasonable man, knew the facts to be. Of course he ran the risk that the Court might determine the facts to be other than what he thought they were. In such a case he might be convicted. But surely he must have an opportunity of persuading the Court that he was right and that the Committee had been misguided. Certainly he cannot be held down to the information before the Committee. To do that would make it impossible for any person ever to know whether or not he was violating the law. Due process does not permit a person to be sent to jail for misjudging the impact of undisclosed information or for relying on his knowledge as against incorrect information even publicly supplied to an investigating committee. A conviction resting on such a basis would run foul of the constitutional requirement of certainty.

See:

Lanzetta v. *New Jersey,* 306 U. S. 451;
Musser v. *Utah,* 333 U. S. 95;
Winters v. *New York,* 333 U. S. 507.

This requirement, as the *Winters* case makes clear, is particularly applicable where, as here, rights under the First Amendment are involved.

Care must be taken not to confuse the justification which the Committee might have believed it had for the issuance of a subpoena with the criminal liability of the person served for disregarding it. While the facts showing a reasonable belief on the Committee's part may create a prima facie case of relevancy (and here, we submit, even

that was not established) a person charged with wilful refusal to produce records must have the right to show that in fact there was no basis for their being subpoenaed. Otherwise his rights under the Fourth Amendment have been infringed.

Indeed, if the Committee's views of pertinency are the criterion then the indictment must be dismissed. For the Committee may have reached its conclusion under either of the two parts of the Resolution and the Court of Appeals in the *Barsky* case, 167 Fed. 2d 241, indicated that the first part, the one dealing with "un-American" propaganda, violates the constitutional requirement of certainty. Since, therefore, the Committee may have acted on a ground not available to it, the refusal to obey the subpoena cannot be punished. In logic and justice the same rule should apply here as is applied to a jury verdict possibly resting on a basis held improperly before the jury. See *Nash* v. *United States,* 229 U. S. 373; *Stromberg* v. *California,* 283 U. S. 359; *Williams* v. *North Carolina,* 317 U. S. 287; *Cramer* v. *United States,* 325 U. S. 1; *Terminiello* v. *Chicago,* 337 U. S. . The rule is well stated in *Haupt* v. *United States,* 330 U. S. 631, 641, n. 1.

The argument that the actual facts must determine the issue can be sharpened by reference to a few possibilities. Suppose at a public hearing testimony is given that one John Jones was involved in a certain transaction clearly within the scope of an investigating committee and a subpoena is issued to him to produce his cancelled checks and bank accounts. Could not the individual served with the subpoena establish that he was not the John Jones connected with the particular transaction? Could he not even justify a refusal to produce his records, although admitting that he was the individual intended to be reached, by showing that the testimony that he was connected with that transaction was wholly false? Would any Court say that he must produce his private records for examination by the Committee merely because it had before it some evidence connecting this individual with the transaction

when the Court, on inquiry into all the facts, would find that there was no such connection at all?

So here, we submit, the refusal to produce the records was not a crime if in fact the propaganda activities of the organization involved were not such as brought them within the scope of the resolution governing the activities of the Committee.

The Court of Appeals recognized that the material must be pertinent but misstated the issue raised by petitioner. He has never claimed that he "must be allowed to determine the question of pertinency on the basis of what he knew the facts concerning the Federation to be". He does claim that the Court must determine what the facts are. To that contention the Court of Appeals said only that it "confuses the simple question of the relevancy of the information demanded with the broader question whether the Federation was in fact subject at all to the investigating powers of the Committee".

Then, the Court of Appeals decides the "broader" issue (never raised by petitioner) and finds that the Committee had a right to investigate the Federation. But the Court never decided the real issue in the case, namely, whether the information demanded was pertinent. This failure is all the more remarkable because in *Morford* v. *United States* (argued on the same day as this case was, and decided a week before) the same judges, this time by Judge Miller, said:

> "Obviously the first step in an investigation authorized by House Resolution No. 5 is to determine whether the propaganda being diffused is in fact subversive in the sense of the term used in the Resolution."

And in that case the Court asserted that the propaganda distributed by the organization there involved (The National Council of American-Soviet Friendship) was "of the nature described in the Resolution" because some of it, at least, involved an attack on the "principle" of our form of government. No similar statement was made, or could have been made, in the case at bar.

Such inconsistency among the same judges surely calls for review by this Court.

2. Aside from this, however, the Court did not even permit petitioner to prove what material the Committee had before it. It is perfectly obvious that the Court was not confined to a consideration of the Dies speech alone. No statement by Government counsel or the Committee itself could establish pertinence by reference only to part of what was before the Committee. Petitioner at least had the right to show that on the basis of *all* the material before the Committee the inquiry was not relevant. And the Court, in the statement we have already quoted, appeared to recognize this. Indeed it allowed defense counsel to show, in cross-examination of Mr. Adamson, that the Committee had before it a considerable number of the organization's publications (see R. 72-82). But the Court did not allow counsel to bring before the Court *all* the material which the Committee had. Only that portion of it was introduced in evidence which counsel happened to have in court and which Mr. Adamson was able to identify. For the purpose of getting it all before the Court a subpoena had been issued to the Clerk of the House of Representatives specifying in detail what material was requested (R. 26-31). Items 7 and 8 (R. 27) and 27 and 28 (R. 29) were intended to cover all the documentary material in the possession of the Committee relating to appellant's organization. Yet the Court ruled that those documents were irrelevant (R. 125, 126). That ruling cannot be justified under any theory of the case.

3. No attempt was made by the Court of Appeals to pass on the basic question whether the material called for by the subpoena was relevant to the inquiry. Instead of deciding this question the Court below merely held that it was proper for the Committee to investigate the Federation. Such a ruling would have been appropriate had petitioner refused to answer questions about the character of the organization. This, however, is not what he is being prosecuted for. All

such questions were freely answered. The Committee was fully informed of the character of the material which the Federation distributed.

In ruling that the material called for by the subpoena was pertinent to the inquiry because the Committee had the right to make some investigation of the Federation, the Court below jumped an essential step. We do not dispute that the Committee (assuming its constitutional power, for the sake of argument) would have the right to inquire into the source of contributions made to an organization where there was reasonable cause to believe that the organization was engaged in the diffusion of the kind of propaganda characterized by the Resolution. We insist, however, that unless such reasonable cause can be established, any inquiry into the contributions would be an inquiry into private matters not within the power of the Committee. Such distinction is essential to the protection of all organizations and individuals contributing toward them. Otherwise there would be practically no limits to the investigating power of a committee of Congress. It would be sufficient for someone to cast aspersions upon an organization, however unfounded such aspersions might be, in order to unleash the full light of unfavorable publicity upon all aspects of the organization and subject its contributors to embarrassment and harassment.

It is our belief that the orderly process of investigation requires no such result. While a Committee may have the right to initiate its investigatory process on the basis of rumor or even suspicion, it must be established that the organization is functioning within the ambit of the Committee's authorized activities before the Committee can pry into the private affairs of that organization and its contributors.

Reliance on the Dies speech was here insufficient. Indeed that speech should have been given no consideration whatever by the Committee. The privacy of the citizen would be illusory if it could be invaded whenever a legislator, under the cloak of immunity, made charges in a political

speech, one motivated, moreover, as here, by purely personal considerations. We do not suggest, of course, that a Committee might not examine the propaganda referred to in such a speech. But its reliance should then have been on that propaganda material, not, as here, only on the partisan speech (see R. 102).

The question here involved is of the greatest importance and should be passed upon by this Court: whether a Committee can require disclosure of contributors to an organization engaged solely in the diffusion of propaganda protected by the Bill of Rights and not engaged in the diffusion of any propaganda covered by the terms of the Resolution. That question has never been determined by this Court.

4. To sum up, to avoid conflict with the Fourth Amendment, the Government must establish pertinency. That pertinency cannot exist unless the matters inquired into relate to the subject of the inquiry. Here the subject of the inquiry is propaganda of a certain kind—not all propaganda. There is no suggestion on the part of anyone that the propaganda distributed by the Federation was of the character described in the Resolution. Inquiry into the source of the funds responsible for the propaganda is therefore without pertinence.

POINT III

The validity of the subpoena under the Fourth Amendment.

Petitioner attacked the validity of the subpoena both by motion to dismiss in advance of trial (R. 3), and by motion for acquittal at its conclusion (R. 128) and by motion for a new trial (R. 36).

The subpoena (Ex. 1, R. 144) called upon appellant to produce "all books, records and correspondence pertaining to the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of all contributors". It will be observed that there

was no limitation as to time and, in effect, none as to substance. Actually, to comply with this subpoena petitioner would have had to produce all the financial records and all correspondence relating to contributions and to all expenses for the entire period of the organization's existence. This was nearly six years. (The Federation was organized in June, 1940—R. 52; the subpoena was dated January, 1946—R. 144.)

It is settled law that a subpoena that is too broad is void as a violation of the guaranty against unreasonable searches and seizures contained in the Fourth Amendment: *Hale* v. *Henkel,* 201 U. S. 43; *Bank of America National Trust & Savings Assoc.* v. *Douglas,* 105 F. (2d) 100 (App. D. C.).

It is also settled that the validity of such a subpoena can be tested by refusing to obey it, since there can be no appellate review of an order denying a motion to vacate. *Cobbledick* v. *United States,* 309 U. S. 323. While this principle has ordinarily been enunciated in prosecutions for contempt of court, the rule must be the same in prosecutions under Title 2, § 192, which is the equivalent of a contempt prosecution.

There is no merit to the suggestion made by Judge Holtzoff in his opinion denying the motion to dismiss (R. 23) that petitioner might not be able to raise the point because the subpoena called for records of an organization, citing *United States* v. *White,* 322 U. S. 694. That case dealt with the privilege against self-incrimination which is not available to a corporation, or by analogy, to a voluntary association. Here we are relying on the Fourth Amendment which applies equally to corporations and individuals. (See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.) Indeed in the *Hale* case, supra, the subpoena called for the production of corporate records.

There can be no doubt that the same rules apply to subpoenas issued by legislative committees as to subpoenas issued by any other governmental authority. *United States* v. *Groves,* 18 F. Supp. 3.

We come, therefore, to the question whether the subpoena does violate the Fourth Amendment. Subpoenas less extensive than this have been condemned. See *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298; *Ex parte Brown*, 72 Mo. 83; *People* v. *Reynolds*, 350 Ill. 11; *In re United Shoe Machinery Corporation*, 6 F. R. D. 347.

The cases cited by Judge Holtzoff (R. 23) as indicating that the subpoena was valid are not in point. In *Brown* v. *United States*, 276 U. S. 134, the subpoena covered only a three-year period and was limited as to subject matter; in *Wheeler* v. *United States*, 226 U. S. 478, the period was less than one and a half years. The subpoena in the case at bar is much more like the one condemned in the *Hale* case.

POINT IV

The rulings on the *voir dire*.

During the examination of the talesmen it, of course, became evident that a number of them were government employees. In this particular case it seemed to defense counsel that such employees should not serve at all, or at least, not until they had been questioned about the impact of their employment upon the conscientious exercise of their duties as jurors.

The Court was first asked to exclude all government employees because the Committee was in effect the complaining witness (R. 39) and also because the pendency of the loyalty investigations might affect the judgment of the jurors (R. 40). The Court denied the motion (R. 40). Defense counsel also asked that those talesmen who were government employees be asked whether, in the light of the circumstances, they had any fear (Q. G. 18, R. 39, see discussion, R. 41). The Court refused to permit the question to be asked unless it were emasculated by leaving out the explanatory introduction (R. 41). Two government employees served on the jury (R. 42, 43).

We recognize, of course, that in the ordinary criminal prosecution a person is not disqualified from jury service merely because he is an employee of the Government which is prosecuting the case. *United States* v. *Wood,* 299 U. S. 123. But this Court recognized that the rule was not of universal application. Here, we submit, is a situation to which a different rule should be applied.

For this prosecution was started at the request of the House Committee on Un-American Activities. The past proceedings of that Committee indicate the extent to which it has pilloried and blacklisted persons who had some connection with activities it disliked. (See offers of proof, Deft.'s Ex. 25 for Id. and 26 for Id., R. 149-152, 158-164, Ex. 17, pp. 235-238 and testimony concerning Clifford M'Avoy and Michael Quill at pp. 122-124.) Moreover, the loyalty investigation of all government employees recently ordered by President Truman (Ex. Order 9835, 12 Fed. Reg. 1935), and still under way, was inspired by the same Committee. That Executive Order specifically mentioned the files of the Committee as source material for the investigations. Under these circumstances there is a real possibility that government employees might find it difficult conscientiously to serve as jurors in a case such as this, for fear that participation in a disagreement or an acquittal might result in black marks against them in the records of the Committee and in an investigation of their loyalty.* No talesman should have been asked to suffer this sword of Damocles, no accused should have his liberty depend on the absence of such a fear in his particular case. Surely there would have been enough talesmen available though all government workers had been excluded.

Moreover, in the *Wood* case this Court stressed the fact that a defendant should have the fullest opportunity for probing actual prejudice. Chief Justice Hughes said:

> "It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting,

* See Andrews, Washington Witch Hunt.

to employees of the treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances" (299 U. S. at 149, 150).

Here such full inquiry was not permitted since the crucial question (Q. G. 18, R. 39) was not allowed.

The case at bar thus presents an issue very similar to that on which this Court granted certiorari on June 27, 1949, in *Dennis* v. *United States.*

POINT V

The holding that certain documentary material offered by the defense was irrelevant.

Defense counsel issued subpoenas to obtain certain documents from the possession of the Committee (R. 26-31) and the Attorney General (R. 31-36). The Court ruled that these documents were irrelevant (R. 104, 126). These rulings were included in the grounds of the motion for a new trial (R. 36, 37).

We have already indicated the basis on which this material should have been received. It was all relevant on the issue of the pertinency of the material called for in the subpoena directed to petitioner. So much of it as had been before the Committee when it directed the issuance of that subpoena was relevant under the Trial Court's own ruling (R. 105). The Court permitted the introduction into evidence of such material as happened to be in the possession of defense counsel and to be identified by Mr. Adamson. There was no conceivable basis for rejecting other material which had also been before the Committee. Without *all* that material the Court could not possibly determine the issue of pertinency.

POINT VI

The rejection of proffers of proof made by the defense.

In support of its argument that the Committee was exceeding its constitutional powers and was invading the protected areas of freedom of speech and of the press, defense counsel sought to establish that the Committee was guided by no standards (R. 105-107), that its activities were not in fact within the framework of the Resolution (R. 108-113), that the Committee characterized as un-American and subversive persons who had attacked it (R. 114, 115), including the Federation (R. 236), that its principal activity was to maintain a "black list" (R. 115-117), that this list was compiled without any procedural due process afforded the Federation or the other individuals and organizations named (Ex. 25 for Id., R. 235, 236), that the Committee was primarily engaged in non-legislative activities for the purpose of obtaining conformity to its views (Ex. 26 for Id., R. 237, 238). The Court held all these offers irrelevant (R. 97, 120, 126) and specifically refused to receive the two detailed offers above referred to (Exs. 25, 26 for Id., R. 97, 127).

This material, if received by the Court, would have destroyed the Government's contention that the records sought by the subpoena were pertinent to the inquiry the Committee had been authorized to conduct.

We submit that this material was relevant also to a proper understanding of the basic constitutional contentions and should have been received. This Court has often had occasion to comment on the undesirability of passing on grave constitutional issues without a full factual background. *Bunting* v. *Oregon*, 243 U. S. 426, 438; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194, 213.

It is necessary to show the actual functioning of a challenged law in order to rebut the presumption of constitutionality which otherwise attaches. See *Snowden* v. *Hughes*, 321 U. S. 1, 8-9.

POINT VII

The rulings with regard to wilfulness.

In order to persuade the jury that he had not wilfully refused to produce the subpoenaed records petitioner asked to have read to the jury the statements (Exs. 14, 16) which he had given to the Committee when he appeared before it. This request was refused (R. 127).

Petitioner requested the following charges on the subject of wilfulness (R. 129):

> "(11) Wilfulness is a state of mind. You must consider the state of mind of the Defendant at the time the alleged offense occurred, and you must determine whether the Defendant was wilful or not at such time.
>
> "(12) The absence of wilfulness may be deduced from the Defendant's conduct, from the things he did or said, and from all other circumstances which surrounded his alleged failure to produce the records called for by the Summons or subpoena.
>
> "(13) In the commission of an offense under the law under which the Defendant is charged in this case, wilfulness denotes an act done with an evil purpose, without justifiable excuse, and without ground for believing it lawful, or conduct marked by careless disregard of whether or not one has a right to act.
>
> "(14) If you believe that the Defendant refused to produce the papers or records as charged in the indictment because he had an honest, bona fide belief that the Committee on Un-American Activities was acting beyond its power and in an unconstitutional manner, you may consider this fact in determining whether or not Defendant's conduct in such refusal was wilful."

The Court did not expressly rule on any of these requests, indicating that exceptions should be taken after the charge to the extent that they were not granted (R. 133).

The Court's actual charge on this subject was very

brief and reads as follows—the matter in parentheses being supplied to correct an evident error in the printing:

> "Several times during this charge I have used the term 'wilful' or 'wilfully.' 'Wilful' as used in 2 United States Code, Section 192, the section under which the defendant is indicted, means 'deliberate and intentional' and (not by) inadvertence or accidental. Thus, the motive of the defendant in failing to comply with the subpoena and his reason for such failure are not material, so long as you find that the defendant did so intentionally and deliberately" (R. 140).

Counsel excepted to the refusal to charge as requested and specifically to the charge as made (R. 141).

We recognize, of course, that this Court has refused to review the holding in *Fields* v. *United States,* 164 F. (2d) 97, cert. den. 332 U. S. 851, that "wilful" in this statute means only "deliberate". But we submit that a different rule is applicable here because the Resolution could be saved from condemnation on the score of vagueness only by interpreting "wilful" to mean more than "deliberate", as was done in *Screws* v. *United States,* 325 U. S. 91.

CONCLUSION

We respectfully submit that there are important questions which call for review by this Court so that the scope of the powers of congressional committees and the rights of persons and organizations called on to produce private records may be determined and clarified.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Petitioner.

APPENDIX A

Exhibits to be Presented to the Court Physically

INDEX

Deft.'s Ex. 1	Investigate Martin Dies
Deft.'s Ex. 2	Call to a Conference
Deft.'s Ex. 3	Brochure
Deft.'s Ex. 13—Comm.'s Ex. 1	Poll Tax Repeal
Deft.'s Ex. 13—Comm.'s Ex. 3	How Your G. I. Joe Can Vote
Deft.'s Ex. 13—Comm.'s Ex. 4	F. E. P. C.
Deft.'s Ex. 13—Comm.'s Ex. 9	Everybody's Business
Deft.'s Ex. 13—Comm.'s Ex. 28	600 Prominent Americans
Deft.'s Ex. 13—Comm.'s Ex. 32	The Only Sound Policy for a Democracy
Deft.'s Ex. 13—Comm.'s Ex. 34	Speed the Day
Deft.'s Ex. 13—Comm.'s Ex. 36	They Still Carry on
Deft.'s Ex. 13—Comm.'s Ex. 39	One Nation, Indivisible
Deft.'s Ex. 13—Comm.'s Ex. 42	Stop the Un-American Activities Committee
Deft.'s Ex. 17	House Report No. 2233
Deft.'s Ex. 19	A Message to the House of Representatives
Deft.'s Ex. 22 For identification (Excluded)	Letterhead